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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN ALLEN SAWYER,

Defendant and Appellant.

B211458

(Los Angeles County
Super. Ct. No. KA071834)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bruce F. Marrs, Judge. Affirmed.

Smyth Law Office and Andrew E. Smyth for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Lawrence M. Daniels and Yun K. Lee, Deputy Attorneys General, for Plaintiff and
Respondent.

In Brian Allen Sawyer’s first appeal we affirmed his convictions for assault with a semiautomatic firearm (two counts) and shooting at an inhabited dwelling with true findings on the related criminal street gang and firearm-use allegations and enhancements. (*People v. Macklin* (June 25, 2007, B190650) [nonpub. opn.].) We remanded the case for resentencing as to one of the two aggravated assault counts, however, concluding the trial court’s imposition of the upper term was impermissibly based on facts not found true by the jury beyond a reasonable doubt or admitted by Sawyer in violation of *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] (*Cunningham*). On remand the trial court again sentenced Sawyer to the upper term of nine years for assault with a semiautomatic firearm. We affirm.

PROCEDURAL BACKGROUND

At Sawyer’s original sentencing hearing the trial court imposed an aggregate state prison term of 37 years to life: an indeterminate term of 15 years to life for shooting at an inhabited dwelling (Pen. Code, § 246), using the alternate penalty specified in Penal Code section 186.22, subdivision (b)(4), for that offense when committed for the benefit of a criminal street gang; a consecutive, upper term of nine years for one count of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)), plus a 10-year criminal street gang enhancement pursuant to Penal Code section 186.22, subdivision (b)(1)(C); and a two-year consecutive term for the second assault-with-a-semiautomatic firearm count (one third the middle term), plus a one-year criminal street gang enhancement.

As we discussed in our prior opinion, the probation report listed eight factors in aggravation, none in mitigation, and recommended an upper term sentence.¹ In imposing

¹ The probation report listed the following factors in aggravation: (1) The crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness; (2) the defendant was armed with or used a weapon at the time of the commission of the crime; (3) the victim was particularly vulnerable; (4) the crime involved multiple victims; (5) the planning, sophistication or professionalism with which the crime was carried out, or other facts, indicate premeditation; (6) the defendant engaged in a pattern of violent conduct that

sentence, including the upper term on the first aggravated assault count, the court reviewed the facts of the case and in doing specifically mentioned several of the factors identified in the probation report, including the fact the shooting had been done in a cold and callous manner (see Cal. Rules of Court, rule 4.421(a)(1)).² Rejecting Sawyer’s plea for imposition of a less severe sentence based on the fact he was only 15 years old at the time of the offense and his codefendant had been the actual shooter, the trial court explained, “There’s no doubt in the court’s mind that the aggravating circumstances outweigh any mitigating circumstances relating to age.”

We reversed the upper term sentence for aggravated assault, applying the United States Supreme Court’s decision in *Cunningham, supra*, 549 U.S. 296, which held California’s determinate sentencing law violates a defendant’s federal constitutional right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution to the extent it authorizes the trial judge to find facts (other than a prior conviction) by a preponderance of the evidence that subject a defendant to the possibility of an upper term sentence. Although the probation report also contained information Sawyer had suffered a prior juvenile adjudication for a theft crime and was on juvenile probation at the time of the current crimes, the trial court did not rely on, or even mention, any factor bearing on recidivism in imposing the upper term. Had it done so, we explained, rather than rely on its own evaluation of the callousness of the crimes committed—a fact not found by the jury beyond a reasonable doubt—imposition of the

indicates a serious danger to society; (7) the defendant’s prior convictions as an adult or the adjudication of the commission of crimes as a juvenile are numerous or of increasing seriousness; and (8) the defendant was on probation or parole when he committed the crime.

² The trial court also identified the use of a gun in the commission of the offenses as an aggravating factor (see Cal. Rules of Court, rule 4.421(a)(2)), but a fact that is an element of the crime may not be used to impose the upper term as punishment for the crime. (*Id.*, rule 4.420(d).) Use of a firearm, of course, is an element of both assault with a semiautomatic firearm and shooting at an inhabited dwelling. Moreover, the record appears to establish that Sawyer’s codefendant was the shooter.

upper term for aggravated assault under California’s determinate sentencing law as it then existed might not have violated Sawyer’s right to a jury trial. In addition, in light of the jury’s failure to convict Sawyer of the attempted murder of the two victims of the aggravated assaults and the fact Sawyer’s codefendant, not Sawyer himself, was the shooter, we could not say beyond a reasonable doubt the jury would have concluded, as did the trial judge, that Sawyer had behaved in a cold and callous fashion in carrying out the crimes. Accordingly, we held the error was not harmless, vacated the sentence imposed on this count and remanded the matter for resentencing.

The trial court held a new sentencing hearing on October 8, 2008. Sawyer’s counsel argued our opinion remanding the case required the court to impose nothing greater than the middle term of six years, rather than the upper term of nine years, for assault with a semiautomatic firearm because the aggravating factors upon which the court had previously based its decision to impose the upper term were not found true by a jury. The People argued the court was authorized to impose the upper term and could consider Sawyer’s prior juvenile adjudication as an aggravating factor in determining the appropriate sentence.

Neither counsel addressed—and the trial court did not discuss—the impact of the Legislature’s post-*Cunningham* amendments to the determinate sentencing law or the California Supreme Court’s July 19, 2007 decision in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*),³ in which the Court “fashion[ed] a constitutional procedure for resentencing in cases in which *Cunningham* requires a reversal of an upper term sentence.” (*Sandoval*, at p. 846.) Without deciding whether the new legislation applied directly to cases pending on appeal that are remanded for resentencing, like the case at bar, the *Sandoval* Court held a defendant is properly resentenced under a judicially reformed sentencing scheme in which the trial court has full discretion to impose the upper, middle or lower term unconstrained by the requirement that the upper term may

³ *Sandoval*, *supra*, 41 Cal.4th 825, was decided the month after our decision vacating Sawyer’s sentence on the aggravated assault count and remanding the case for resentencing.

not be imposed unless an aggravating circumstances is established. (See *id.* at pp. 845-852; *People v. French* (2008) 43 Cal.4th 36, 45.) “Under [the Supreme Court’s] holding in *Sandoval*, if a defendant is successful in establishing *Cunningham* error on appeal, the trial court is not precluded from imposing the upper term upon remand for resentencing. The defendant is entitled only to be resentenced under a constitutional scheme and is afforded the opportunity to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence.” (*French*, at pp. 45-46.)

Proceeding without reference to the *Sandoval* sentencing procedures, the trial court again imposed the upper term on the aggravated assault count, interpreting our prior opinion as suggesting it was proper to rely on Sawyer’s sustained juvenile petition for theft as an aggravating factor. The trial court explained, “The Court [of Appeal] appears to have drawn a bright line as to what would constitute an aggravating factor for an upper term. And the court, having reviewed the probation officer’s report filed in this case originally, which does, in fact, indicate a juvenile case . . . citing that as an . . . aggravating factor, as to count 3, the only count we’re dealing with, the court selects the high term of nine years.” The court also reimposed the 10-year criminal street gang enhancement on the remanded aggravated assault count and directed that all sentencing findings relating to the other two counts remain in full force and effect.

CONTENTIONS

Sawyer contends the trial court erred in again imposing the upper term for assault with a semiautomatic weapon because it failed to follow our express mandate on remand and because one prior juvenile adjudication does not fall within the recidivism exception to the right to a jury trial recognized in *Blakely*, *supra*, 542 U.S. 296 and *Cunningham*, *supra*, 549 U.S. 270.⁴

⁴ With only a conclusory statement and without any legal argument or citation of authority (see Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be supported by argument and, if possible, by citation of authority]), Sawyer also contends his aggregated state prison sentence of 37 years to life constitutes cruel and unusual punishment. Because he failed to raise this issue in the trial court or his prior appeal and has not properly raised it now, Sawyer has forfeited this claim. (See e.g., *People v.*

DISCUSSION

Sawyer's argument the trial court failed to comply with the mandate from this court following remand misapprehends our prior decision. In vacating the sentence on count 3 for aggravated assault and returning the case to the trial court for resentencing, we neither directed imposition of a particular sentence nor identified the factors or circumstances upon which the new sentence was to be based. The only restriction on the scope of the trial court's sentencing power was that it act consistently with Sawyer's constitutional right to a jury trial.

By the time of the new sentencing hearing in October 2008, the trial court was entitled to proceed pursuant to—and Sawyer's constitutional rights were fully protected by—the reformed sentencing scheme described in *Sandoval*, *supra*, 41 Cal.4th 825. There, the Supreme Court performed what we have previously termed a limited judicial reformation of Penal Code section 1170 with respect to defendants whose cases were remanded for resentencing (see *People v. Lincoln* (2007) 157 Cal.App.4th 196, 205) that mirrors the Legislature's urgency legislation signed by the Governor on March 30, 2007, in which Penal Code section 1170, subdivision (b), was amended to eliminate the statutory presumption for the middle term. As it was in effect at the time of Sawyer's trial and initial sentencing, that section provided, when an offense is punishable by one of three statutory terms, "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Rather than invent a system for charging and trying aggravating factors by jury under the reasonable doubt standard, the Legislature removed the statutory presumption of the middle term so that the section now reads, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (Pen. Code, § 1170, subd. (b), as amended by Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007.) Thus, the trial court was fully authorized under the United

Williams (1997) 16 Cal.4th 153, 250 [constitutional objections not properly raised are forfeited]; see also *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8 [forfeiture of claim of cruel and unusual punishment].)

States Constitution and California's reformed sentencing law to impose the upper term for the aggravated assault, subject only to Sawyer's right to attempt to persuade the trial court to exercise its discretion to impose a lesser sentence. (See *People v. French*, *supra*, 43 Cal.4th at p. 451.) Sawyer had an opportunity to do so and took full advantage of it (albeit unsuccessfully).

Sawyer's second challenge to his resentencing is equally without merit. The California Supreme Court recently held the right to a jury trial recognized in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2438, 147 L.Ed.2d 435] "does not preclude use of nonjury juvenile adjudications to enhance later adult sentences." (*People v. Nguyen* (July 2, 2009, S154847) __ Cal.4th __, __ [2009 Cal.Lexis 6060].) Moreover, even before *Nguyen* resolved the issue, under the *Sandoval* reformed determinate sentencing scheme, whether or not a prior juvenile adjudication for a theft offense fell within the recidivism exception recognized in *People v. Black* (2007) 41 Cal.4th 799 and *People v. Towne* (2008) 44 Cal.4th 63 was irrelevant. Because the statutory presumption for the middle term has been eliminated, imposition of the upper term rested within the sound discretion of the trial court. No additional jury findings were necessary. And Sawyer does not argue the trial court abused its discretion in sentencing him to a nine year term for assault with a semiautomatic firearm.

Finally, to the extent Sawyer now contends a prior juvenile adjudication is not one of the aggravating circumstances or factors recognized by the California Rules of Court because a single offense necessarily is neither "numerous" nor of "increasing seriousness" (see Cal. Rules of Court, rule 4.421(b)(2)), he failed to raise this claim of state law error at the time of sentencing.⁵ Accordingly, the issue has been forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [unless there was a timely objection at the time of sentencing, a reviewing court will not consider "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"]; *People v.*

⁵ As discussed, Sawyer's argument on resentencing was limited to his incorrect assertion our prior opinion precluded the trial court from imposing the upper term on the aggravated assault count for any reason.

Velasquez (2007) 152 Cal.App.4th 1503, 1511-1512 [by failing to object, appellant forfeited claim upper terms were improper because the trial court did not state on the record its reasons for imposing those terms]; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 84 [finding waiver when counsel had a meaningful opportunity to object to court's sentencing choice but failed to do so].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.